Supreme Court, U.S.
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No. 94-1556

In The

# Supreme Court of the United States

October Term, 1994

ALLEN BUHR, et al.,

*Petitioners,*

v.

FLATHEAD COUNTY, et al.,

*Respondents.*

**Petition For Writ Of Certiorari**
**To The Supreme Court Of Montana**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the state appellate court was correct in refusing to consider Petitioners' claim of plain error when it was conceded by Petitioners that they discovered the alleged error during trial proceedings, hinted at the error, failed to propose any alternative standard, and chose to proceed under a standard of deliberate indifference regarding their civil rights claims.

2. Whether certiorari would be improvidently granted, where Petitioners have failed to appeal, or petition for review of, the negligence claims which were decided against them.

3. Whether the claimed error was harmless error, regardless of which standard of liability applied, when Petitioners failed to prove negligence.

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## STATEMENT OF THE CASE

Respondents respectfully disagree with Petitioners' Statement of the Case. Petitioners represent that both parties and the trial court were unaware of the "professional judgment" standard of *Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) when this matter was tried. That is ***not*** true and runs directly contrary to the admission and concession Petitioners made in oral argument to the state appellate court. The Montana Supreme Court expressly noted Petitioners' concession that they were aware of error during trial proceedings, but made no attempt to correct the error. The Montana Supreme Court stated:

> "The plain error doctrine 'allows this Court to review errors that were not objected to at trial, but result in substantial injustice to a party by denying that party a fair trial.' *Geiger v. Sherrodd* (1993), 262 Mont. 505, 508, 866 P.2d 1106, 1108. The doctrine is 'used in exceptional circumstances and should not be relied upon by counsel.' Commission Comments, Rule 103(d), M.R.Evid. Here Buhr himself failed to present the District Court with what he now contends is the appropriate standard for adjudication of his civil rights claims. ***He also conceded during oral argument that upon discovering his alleged error during the trial proceedings, he hinted at the "concept" that deliberate indifference was the wrong standard but failed to proposed any alternative standard to the District Court.***"
>
> We decline to apply the plain error doctrine ***under such circumstances*** or to address the merits of Buhr's argument raised for the first

time on appeal . . . " *Buhr v. Flathead County*, 886 P.2d 3[illegible], 389-90 (Mont. 1994) (Emphasis added.)

Respondents respectfully ask this Court to take note of this concession and correct the Statement of the Case in this respect. As described hereafter, this concession has special significance in the context of the doctrine of plain error and the exception to that doctrine.

## STATEMENT OF FACTS

Respondents also respectfully disagree with Petitioners' Statement of Facts. These are ***not*** the facts found by the jury, nor were they the facts found by the trial court or state appellate court.

Joshua Lloyd was confined to the Flathead County Detention Center specifically at the request of his mother and mental health professionals, pursuant to Montana's Mental Health Act, § 53-21-129, MCA (1987). The detention was necessary because of Joshua's increasing rages and violent outbursts – he had threatened his mother with personal injury and was beating his bedroom door with a baseball bat the day he was detained. He later continued to exhibit the same violent behaviors when taken into detention by throwing objects and threatening the police. Mental health professionals, therefore, recommended a short-term placement under the emergency detention statute.

As correctly recognized by the state appellate court, and as distinguished from *Youngberg* (which involved a patient committed to a state mental hospital), Joshua was not committed for treatment as a patient. *Buhr*, 866 P.2d at

388. The Flathead County Detention Center is and was not a "mental health facility" pursuant to § 53-21-102(7), MCA (1987).

Nevertheless, Joshua was carefully watched by the detention center staff throughout his stay and never appeared to be in a state of medical emergency at any time (although he did exhibit behavior typical of mental health detainees.) As found by the jury and noted by the state appellate court, Joshua was closely monitored by detention center personnel pursuant to a "hands off" policy which was recommended by mental health professionals. Observations were made and conducted by detention center personnel of Joshua every fifteen to thirty minutes both in person and via visual and audio monitor.

Petitioners claim in their Statement of Facts that Joshua was in a state of medical emergency throughout the night of his detention, suffering fever, dehydration, hallucinations, and seizures. Petitioners also claim Joshua vomited early in the morning, lay motionless on the floor from approximately 5:30 a.m. to 12:00 a.m., and was "rushed" to the hospital. These are ***not*** the facts, although Petitioners made the same claims and assertions to the jury, trial court and appellate court. These claims and assertions were unequivocally rejected at all levels. The vast disparity between Petitioners' claims and the true facts of this case are more particularly set forth in Respondents' Supplementary Statement of Facts which were submitted to the state appellate court and a copy of which is attached as Appendix A. For reasons of brevity, those matters will not be repeated here. Simply stated,

Petitioners' claims or assertions are not the true facts of this case.

Joshua was not in a state of medical emergency at any time during his detention. Absolutely no one – detention officers, ambulance attendants, hospital nurses, mental health workers, or physicians – ever determined this to be a fact. Joshua was observed at the detention center by personnel, who had training in first aid, every five to ten minutes on the monitor and in person every fifteen to thirty minutes throughout the first, second and third shifts. The morning after Joshua was detained, he was seen up on his feet at approximately 6:00 a.m. and up again at 9:00 a.m. When mental health professionals consulted Joshua's physician for a transfer to the hospital because his violent behavior had calmed down, a routine order for admittance was made by Joshua's physician to the hospital. One detention officer on the third shift saw Joshua rocking back and forth at approximately 11:55 a.m. before the ambulance transferred him to the hospital. The same officer then observed that Joshua had vomited approximately ten minutes later, shortly before the ambulance arrived.

When the ambulance attendants arrived at the detention center for Joshua's transfer, they explained that, although Joshua had discoloration to his arm, they did not perceive him to be in any medical emergency. They did ***not*** make an emergency run to the hospital. If they had, they explained that they would have run with lights and siren and would have called city dispatch to trip traffic lights. They did no such thing. Three hospital nurses who attended to Joshua and saw him shortly after

he arrived at the hospital also never observed any medical emergency. The nurses explained that there was no emergency until he had a large seizure at approximately 12:45 p.m. When Joshua arrived at the hospital, his treating physician was not paged "stat." The hospital's expert also stated there Joshua had a seizure similar to a grand mal seizure at 12:45 p.m. and that there was no medical emergency before this time. (See Appendix A - Respondents' Supplementary Statement of Facts to state appellate court).

In directing and affirming a verdict for Respondent on the civil rights claims, both the trial and state appellate court noted the training of detention center personnel and their observations of Joshua every fifteen to thirty minutes and that he did not appear to be in any state of medical emergency. Both courts also noted the detention policy that, if an emergency had been observed, medical help would have been summoned. The state appellate court noted the propriety of directing the verdict under the evidence presented where such observations and determinations had been made. *Buhr*, 886 P.2d at 392.

Petitioners assume in their Statement of Facts that the trial court applied an improper standard of review for their civil rights claims. Respondents do not concede that the "professional judgment" standard of *Youngberg* applies to detention center personnel, particularly under the circumstances of this case. This case, unlike *Youngberg*, did not involve a patient or placement at a state mental hospital, but a temporary detainment in a jail or detention center under the specific provisions of Montana's Mental Health Act. More importantly, however, the term "professional" is particularly defined under the Act.

§ 53-21-102, MCA (1987). The term has special significance. § 53-21-105, MCA (1987). Moreover, the detention center or jail is not recognized as a "mental health facility" under state law. § 53-21-102(7), MCA (1987). Under these circumstances, it is respectfully submitted that the "deliberate indifference" standard was properly applied, and if not properly applied, application of the "professional judgment" standard would have not resulted in any difference in directing a verdict.

Finally, Petitioners fail to mention in their Statement of Facts that the jury found no negligence against Respondents. (See Appendix B - Jury Verdict). Petitioners do not mention that they have not appealed the negligence claims that were adversely decided against them. No issue has been raised in the Petition for Certiorari concerning the negligence claims. These facts should be added to the Statement of Facts.

## ARGUMENT

### Summary of Argument

### I. The Exception To The Plain Error Doctrine Applies.

A. The appellate court was correct in refusing to adopt Petitioners' claim of plain error **under the circumstances of this case**. Petitioners conceded before the state appellate court that they discovered and hinted at the alleged error during trial proceedings, but failed to propose any alternative, and then chose to try their case under a "deliberate indifference" standard.

**II. Certiorari Would Be Improvidently Granted.**

A. The writ of certiorari, if entertained, would be improvidently granted because Petitioners have not appealed their negligence claims and cannot meet their burden of proof under the plain error doctrine in establishing that the outcome on the federal civil rights claims would be any different. The proof of liability for their civil rights claims is more stringent than negligence and would lead to inconsistent results, if certiorari were granted in this case.

**III. Any Error, If It Occurred, Was Harmless.**

A. If any error occurred, the error was harmless error, regardless of which standard of civil rights liability applied. Under any standard, whether "professional judgment" or "deliberate indifference," Respondents were entitled to a directed verdict under the evidence, particularly when Petitioners failed to even prove negligence, which is a standard less stringent than that required for proof of liability for civil rights claims.

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## DETAIL OF ARGUMENT
## REASONS FOR DENYING THE WRIT

**I. The Exception To The Plain Error Doctrine Applies.**

The state appellate court was correct in denying Petitioners' claim of plain error under the circumstances of this case. Petitioners conceded before the state appellate court that they discovered and hinted at the alleged error

during trial proceedings, but failed to propose any alternative, and then chose to try their case under a "deliberate indifference" standard.

The doctrine of plain error is not without exception, even where a party claims to have suffered a Constitutional error or an error relating to a Constitutional right. As early as 1943, this Court recognized that, in *Johnson v. United States*, 318 US 189, 87 L.Ed 74, 63 S.Ct. 549, it would not entertain plain error claims when a party or its counsel gives silent or express approval to a court's action. This Court made clear that, where counsel fails to save a point and leads a trial judge to believe that counsel is satisfied, a party is not entitled to pursue one course of action at trial and then, when that course of action has proved unprofitable, insist on appeal that the course which he rejected should be reopened to him. *Johnson*, 318 US at 291, 87 L.Ed at 713. A party may not complain of error in which he acquiesced when the case is argued on appeal.

This exception to the plain error doctrine has been applied to many cases, both in state and federal courts. The exception is not limited to criminal cases, but extends to civil cases. See e.g., *Schultz v. Rice*, 809 F.2d 643, 647 (10th Cir. 1986), and *Neu v. Grant*, 548 F.2d 281, 287 (10th Cir. 1977), where the courts stated, referring to and upholding the plain error doctrine, as follows:

> " . . . it does not permit a party to sit idly by, watching error being committed, and then take a "first shot" at the claimed error without having accorded the trial court an opportunity to correct its action. (Citation omitted.)

As recently as eight years ago, this Court denied other parties the remedy of certiorari under circumstances substantially similar to the case at bar. See *Ghandi v. Police Dept. of City of Detroit*, 823 F.2d 959 (6th Cir. 1987), certiorari denied 484 US 1042, 98 L.Ed.2d 861, 108 S.Ct. 774. In *Ghandi*, Plaintiffs brought certain civil rights claims against defendants and attempted to argue on appeal that a different standard of proof or liability should have been allowed, but which Plaintiffs failed to preserve or argue before the trial court.

At the trial level, Plaintiffs in *Ghandi* asserted that the appropriate standard of proof for their civil rights claims was negligence, rather than gross negligence or deliberate indifference. At the close of Plaintiffs' evidence, the trial court granted a directed verdict and Plaintiffs' claims were involuntarily dismissed. Plaintiffs failed to alert the court to any theory involving gross negligence. The pretrial order contained no such allegations, Plaintiffs never moved to modify the pretrial order, nor did Plaintiffs ever present any offer of proof or advised the judge as to such a theory. The Court of Appeals affirmed the directed verdict or dismissal, noting Plaintiffs' conduct at the trial level and in particular that the different standard of proof had never been argued or suggested to the trial court. Plaintiffs then petitioned this Court for a writ of certiorari, which was denied.

The plain error rule and its exception is recognized and followed in Montana. *In Re Marriage of Smith* (1990), 791 P.2d 1373, 1377; *In Re Marriage of Green* (1978), 176 Mont. 532, 536, 579 P.2d 1235, 1237; *Dieruf v. Gollaher* (1971), 156 Mont. 440, 447, 481 P.2d 322, 326; *Johnson v. Green* (1969), 153 Mont. 251, 255, 456 P.2d 290, 293; *Harris*

*v. Lloyd* (1891), 11 Mont. 390, 28 P.2d 736. Petitioners in this case were unsuccessful in arguing on appeal and in their petition for rehearing that the exception to the plain error rule should not apply.

This was based upon several matters.

**A.** ***Concession At Oral Argument.*** First, the court's refusal to apply the plain error doctrine was based on Petitioners' counsel's concession during appellate oral argument that ***"upon discovering his alleged error during the trial proceedings, he hinted at the 'concept' that deliberate indifference was the wrong standard but failed to proposed any alternative standard to the District Court."*** *Buhr*, 886 P.2d 389-90 (emphasis supplied). The state appellate court felt that the exception to the plain error doctrine applied. The Montana Supreme Court refused to permit Petitioners, with such knowledge, to sit idly by, watch error be committed, proceed with another theory or standard of proof, and then take a "first shot" at the claimed error upon appeal.

The state appellate court's refusal to apply the plain error rule was also based upon other conduct of Petitioners, apart from this concession. Despite Petitioner's apparent knowledge, the Montana court recognized other action and conduct invoked the exception to the plain error doctrine.

**B.** ***Affirmative Representation In Brief.*** During the trial, Petitioners asked for permission to file a brief in response to the directed verdict motions. (R 4563-64). Petitioners affirmatively represented in their brief that they "had an obligation to prove deliberate indifference."

(Appendix C - Petitioners' Response to Motions to Dismiss of Respondents' Flathead County and Sheriff Rhodes dated 7/24/91, pages 5 and 6.) Petitioners never suggested or advised the trial court that the "professional judgment" standard of *Youngberg* was the appropriate standard of review. The Montana Supreme Court specifically noted this affirmative conduct in its opinion:

> "Our review of the record before us reveals that, in his brief in the District Court on the civil rights claims, Buhr affirmatively stated that he had 'an obligation to prove deliberate indifference.'" *Buhr*, 886 P.2d at 389.

C. ***Position Taken In Jury Instructions***. In addition, Petitioners submitted jury instructions to the trial court in advance of the trial on the standard of review which they proposed. A total of eight jury instructions were proposed, all of which contained a "deliberate indifference" standard of review for their civil rights claims.[1]

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[1] Eight jury instructions were proposed by Plaintiffs regarding the standard to be applied to their civil rights claims. (See Appendix D). Instruction 52 proposed "deliberate indifference" as the standard to be applied for an alleged custom or policy of inadequate detention officer supervision. Instructions 53 and 53A proposed "deliberate indifference" as the standard to be applied for inadequate mental and medical care under the Eighth Amendment. Instructions 54 and 54A proposed "deliberate indifference" as the standard to be applied if there was a beating or excessive force under the Eighth Amendment. Instruction 55 proposed "deliberate indifference" as the standard to be applied for excessive force under the Due Process clause of the Fourteenth Amendment. Instruction 57 proposed "reckless or callous indifference" as the standard to be applied for punitive damages under the Eighth Amendment or Due

> At no time did Petitioners ever suggest, infer or intimate in their proposed jury instructions that the "professional judgment" standard under *Youngberg* was the correct standard to be applied. Again, the Montana Supreme Court noted this conduct and the proposed jury instructions by stating "Buhr's proposed jury instructions required proof of deliberate indifference rather than the professional judgment standard he now advocates." *Buhr*, 866 P.2d at 389.
>
> D. ***No Oral Argument Of Different Standard Or Offer Of Proof***. Finally, Plaintiffs never suggested a different standard in any oral argument or made an offer of proof to that effect. (TR 4556-4569, 4975-4979.) They instead chose to proceed with their theory under another standard of law.

These matters, then, formed the basis for the appellate court refusing to entertain plain error.

At page 12 of their Petition, Petitioners suggest a de novo review because Montana has apparently some unique rule which precludes the review of federal questions or claims. Similarly, it is suggested at page 13 that Montana has a procedural rule which effectively precludes the litigation of federal claims or runs contrary to the Supremacy Clause.

Those claims are simply ***not*** true. Montana has no such rule. Montana's plain error rule, and its exception,

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Process Clause. Finally, Instruction 72 proposed "deliberate indifference" as the standard to be applied for punishment by incarceration under the Eighth Amendment.

are not unusual or unique; the exception to the plain error doctrine has been recognized and applied by other state and federal courts. The authorities cited by Petitioners do ***not*** involve cases which discuss the exception to the plain error rule or involve parties who made such concessions or engaged in such affirmative conduct at the level of the trial court.

Petitioners' efforts to make "twisted" or contorted interpretations of Montana law ought not to be accepted by this Court. The real truth is that Petitioners were unsuccessful in arguing that the exception to the plain error rule should not apply.

**II. Certiorari Would Be Improvidently Granted.**

It is also respectfully submitted that certiorari would be improvidently granted where Petitioners have failed to appeal from, or petition for a review of, their negligence claims which were decided against them.

It is well established that the party who claims plain error has the burden to show that the error almost certainly affected the outcome of the case. *Lusby v. T.G.&Y Stores, Inc.*, 796 F.2d 1307, 1312 (10th Cir. 1986). Although Petitioners attempt to do exactly this by suggesting at page 14 of their Petition that the outcome of the case would necessarily have been different because all reasonable inferences and credibility assessments must be drawn in their favor, the simple fact remains that Petitioners cannot meet this burden, given the outcome and the jury's decision on the negligence claims as well as

Petitioners' failure to appeal or seek review of those claims.

Petitioners have filed a Petition with this Court which only seeks review of their federal civil rights claims and the appropriate standard to be applied concerning them. Their Petition for Certiorari does ***not*** petition for a review of the adversely-decided negligence claims. Therefore, an ***unappealed*** outcome of this case is that the jury did not find that Respondents were negligent. (See Appendix B - Jury Verdict.) As discussed hereafter, the standard for prevailing on civil rights claims is much more stringent and demanding than negligence, and it is respectfully submitted that Petitioners cannot meet their burden under these circumstances, when they have not appealed their negligence claims. To entertain certiorari under these circumstances, if anything, has the possibility, of leading to entirely inconsistent results, where the least of all thresholds for liability was not established under the circumstances of this case.

This Court has noted in prior decisions that "our inability to reach the negligence issue" can make a case inappropriate for deciding whether a heightened standard of proof should have been entertained for proof of civil rights claims. *Springfield v. Kibbe*, 480 US 257, 258, 94 L.Ed.2d 293, 107 S.Ct. 1114 (1987). Under such circumstances, writs for certiorari are properly dismissed as improvidently granted. Respondents respectfully submit that those are the circumstances here.

Petitioners' reliance upon the case of *Elder v. Holloway*, ___ US ___, 127 L.Ed.2d 344, 114 S.Ct. at 1023 (1994)

is misplaced, given the recognition of the foregoing factors. *Elder* did not involve plain error or its exception, nor did it involve affirmative conduct or concessions such as made by the parties in this particular case.

Perhaps more importantly, however, *Elder* only involved federal civil rights claims. It did not involve ***unappealed*** negligence claims, making the possibilities for review and the outcome of the case much different than the case at bar.

Contrary to Petitioners' assertions at page 13, if this Court allowed the case of *Buhr v. Flathead County* to stand, it would not "occasion appellate affirmation of incorrect legal results." Rather, affirming the appellate court's decision would simply stand as an appropriate acknowledgment of the application of the exception to the plain error rule and would not result in inconsistent outcomes, particularly with reference to ***unappealed*** negligence claims. On the other hand, if this Court were to reverse, clear inconsistencies could occur, particularly when it has been established that Petitioners failed to meet even a lesser standard of proof. In summary, despite Petitioners' protestations to the contrary, this case and *Elder* are much different kinds of cases, and *Elder* is not directly applicable to this claim.

**III. Any Error, If It Occurred, Was Harmless.**

The claimed error, if any, was harmless error, regardless of which standard of review applied, because under any standard, whether "professional judgment" or "deliberate

indifference," more than negligence must be shown, and Petitioners failed to even prove negligence.

This Court has clearly articulated that proof of mere negligence will not suffice to establish liability under the Eighth or Fourteenth Amendment for civil rights claims. In *Daniels v. Williams*, 474 US 327, 328, 106 S.Ct. 662, 663, 88 L.Ed.2d 662, 666 (1986), this Court succinctly stated that . . .

> " . . . the Due Process clause is simply not implicated by a ***negligent*** act of an official causing unintended loss of or injury to life, liberty or property."

Similarly, in *Davidson v. Cannon*, 474 US 344, 348, 106 S.Ct. 668, 670, 88 L.Ed.2d 677, 683 (1986), this Court observed that due process protections "are just not triggered by lack of due care by prison officials."

Several courts have addressed what level of proof is required to establish liability regarding civil rights claims. It is unequivocally clear that more than negligence must be shown. As one court has noted:

> "Certainly, the *Youngberg* standard is far more stringent than that required for a finding of negligence, which may be demonstrated by a professional's mere failure to exercise the level of care expected of other professionals in the same field." *Estate of Connors by Meredith v. O'Connor*, 846 F.2d 1205, 1208 (9th Cir. 1990).

The "professional judgment" standard of *Youngberg* "like recklessness and gross negligence," falls somewhere between simple negligence and intentional misconduct. *Estate of Porter by Nelson v. State of Ill.*, 36 F.3d 684 (7th Cir.

1994). To the same effect is *Jones v. State of R.I.*, 724 F. Supp. 25, 30 (1989). Although lack of due care may lead to serious injury, it simply does not approach the kind of abusive government conduct that the Due Process clause or the Eighth Amendment was designed to prevent. Section 1983 should not be construed to create a font of tort law for common law action, and the party asserting a civil rights claim must prove that a defendant is more than merely negligent to prevail. *Plasko v. City of Pottsville*, 852 F.Supp. 1258, 1262 (1994).

Where mental patients in Montana are placed in and confined to state hospitals, proof of negligence will not suffice, but rather there must be proof amounting to gross negligence under the *Youngberg* standard of review. *Houghton v. South*, 965 F.2d 1532, 1536 (9th Cir. 1991).

In harmless error analysis, the burden is on the beneficiary of the error to show that the error did not affect the outcome of the case. *Lusby v. T.G.&Y Stores, Inc.*, 796 F.2d 1307, 1312 (10th Cir. 1986).

In this regard, Respondents respectfully submit that the jury's verdict in their favor on the issue of negligence "negatives" any liability against them on the civil rights claim, which requires a more stringent standard of proof. Where the jury did not find any liability against Respondents at all, particularly under a lesser standard of proof, there is at most harmless error, if in fact error can be assumed.

In addition, it should also be observed that the result would not have changed with respect to the directed verdict, if the *Youngberg* standard had been applied. The evidence at close of Petitioners' case was that detention

center personnel had observed Joshua and made the judgment or determination that he was in no medical state of emergency. The trial court found these to be the facts when it directed the verdict under the "deliberate indifference" standard. The state appellate court also found these to be the facts in affirming the directed verdict. The appellate court stated:

> "Here, the District Court concluded that Buhr's evidence regarding Flathead County's medical policies was insufficient to go to the jury under the deliberate indifference standard. Buhr's evidence established that Joshua was visually monitored every five to fifteen minutes and physically observed every fifteen to thirty minutes while he was detained in the soft cell. He further established that the detention personnel, had they detected a medical emergency, would not have hesitated to summon medical help for Joshua." *Buhr*, 886 P.2d at 392.

This evidence would have equally called for a directed verdict under the "professional judgment" standard, particularly when no detention experts were ever called by Petitioners to suggest a departure from professional standards.

Perhaps the clearest argument demonstrating that any error was harmless, however, was the jury's finding that Respondents were not even negligent. What better evidence is there to suggest that the outcome on federal civil rights claims would not have changed when Petitioners have not appealed the negligence claims and proof of the civil rights claims required a more stringent standard. Therefore, the error was harmless.

## CONCLUSION

Petitioner's Writ of Certiorari should not be granted. The exception to the plain error doctrine applies, despite Petitioners' protestations to the contrary. In addition, it would clearly be improvident for this Court to grant certiorari when Petitioners have failed to appeal the negligence claims, which were decided against them. Assuming any error occurred, the error was harmless because a directed verdict would have been proper under the "professional judgment" standard, and perhaps more importantly, the outcome of the case would not have changed when Petitioner failed to even establish negligence under the circumstances of the case.

**WHEREFORE**, Respondents respectfully request this Court to deny Petitioners' Petition for Certiorari.

Respectfully submitted,

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April 18, 1995.

## APPENDICES

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**APPENDIX A**

**No. 92-061**

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

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**ALLEN BUHR**, Personal Representative of the Estate of Joshua Lloyd, and on behalf of the heirs, **TOM LLOYD, MICHELE LLOYD**, and **MARY LLOYD**,

Plaintiffs/Appellants,

vs.

**FLATHEAD COUNTY**, a political subdivision of the State of Montana; **CHARLES RHODES**, Flathead County Sheriff, in his individual and official capacities; **WALLACE S. WILDER, M.D.; KALISPELL REGIONAL HOSPITAL; FLATHEAD HEALTH CENTER, INC.; WESTERN MONTANA REGIONAL MENTAL HEALTH CENTER**; and **JOHN DOES I through XV**,

Defendants/Respondents.

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**BRIEF OF DEFENDANTS FLATHEAD COUNTY AND CHARLES RHODES**

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Appealed from the Eleventh Judicial District of the State of Montana, in and for the County of Flathead

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## STATEMENT OF SUPPLEMENTARY FACTS

The County and Sheriff Rhodes supplements Defendants' common statement of facts as follows:

This case was tried by the parties under two different versions of the facts. Plaintiffs' theory was that Joshua was ignored by *all* parties and in a state of medical emergency on January 18 before 12:45 p.m. Plaintiffs relied on two experts, John Graham, a pathologist, and George Schwartz, an emergency medicine physician.

Schwartz opined that Joshua was in a medical emergency from 7:30 a.m. forward on January 18 and that this was apparent to a layperson. (TR 2813-2815, 3117). Schwartz also stated a medical emergency existed at 12:10 p.m. which was apparent to a layperson when the ambulance arrived. (TR 2842). Schwartz disagreed that Joshua went into status epilepticus at 12:45 p.m. and that an emergency became first apparent at this time. (TR 2928). Schwartz admitted, however, that he had not read any of the nurses' depositions (TR 3107) and only one of the detention officers' depositions (TR 3110-3111), he did not know much of what happened throughout the night (TR 3111) and he thought Joshua was lying on the floor of the soft cell at all times after 7:30 a.m. (TR 3157).

Plaintiffs' other expert, Graham, likewise stated that there were no seizures which were life-threatening or would cause death and which occurred at the hospital. (TR 256, 398-400). He stated the cause of death was acidosis, although he admitted that a clear airway was found in the ambulance report which was inconsistent with his findings. (TR 253). Graham thought Joshua vomited a number of times and became acidotic by ingesting his vomit. (TR 235). Graham, however, could not cite any evidence or record of Joshua vomiting more than once (TR 327-328). He had not read Nurse Masten's deposition, or other nurses' depositions, indicating that Joshua was in status epilepticus at 12:45. (TR 400, 329-330).

The evidence was much different than the testimony given by Plaintiffs' experts. Joshua was not in a medical emergency until 12:45 on January 18. No one – detention officers, mental health workers, sheriff, treating doctor, ambulance attendants, county attorney or emergency

room and hospital nurses – believed otherwise. No one, regardless of their level of expertise, stated Joshua was in a medical emergency until 12:45 p.m. when he had a seizure at the hospital.

The first shift of detention officers, Edna Martinson, Michael Cooper and Jack Barnes, all testified that Joshua did not appear to be in a state of medical emergency from 1:30-9:30 on January 17. (TR 2053, 2068 (Barnes); 3585 (Cooper); 3522 (Martinson)). Barnes, the control officer, viewed Joshua on the television monitor approximately every 5 minutes (TR 2058), Martinson, the booking officer, checked every 15 minutes (TR 3524), and Cooper, the second floor officer, checked every one half hour. (TR 3548, 3592). Joshua did not ask for food or drink (TR 3523, 3589, 2069-2070), complain of being too hot or cold (TR 3523-3524, 3589), and did not appear ill. (TR 2069, 3523-3524).

The second shift control officer, Kathy Frame, testified that there did not appear to be any medical emergency. (TR 5075). Frame was at the control monitor when Joshua was up from 9:30 p.m. to 3:00 a.m. and then at the booking desk outside the soft cell from 3:00 a.m. to 5:00 a.m. when he went to sleep. (TR 5069). Frame watched Joshua approximately every five minutes. (TR 5028). Joshua did not appear ill (TR 5034) and did not request food or drink. (TR 5033). He did say he was cold, however, and he was given a blanket in response. (TR 5033). Joshua did not go to sleep for the entire shift. (TR 5035).

This is not to say, however, that Joshua was not exhibiting behavior typical of mental health detainees. He was pounding on the walls, attempting to urinate on

officers, shouting for his mother and Santa Claus, taking his clothes off and defecating in the cell. As Frame testified, it is not unusual or abnormal for mental detainees to engage in such behavior. (TR 5073-5081).

The preferred psychological treatment, as stated by Joshua's Salt Lake psychiatrist, Dr. Halvorson, and other witnesses, is a "hands-off" approach. (TR 3980). This prevents further agitation to the detainee.

Ted Stollfuss worked the third shift. He was outside the soft cell from approximately 6:00 a.m. to 1:30 p.m. No medical emergency was apparent to Stollfuss during that time. (TR 5177). Stollfuss observed Joshua up on his feet at approximately 6:00 a.m. (TR 5120-5121) and then sleeping at 7:00 to 7.30. (TR 5121). He did not request food or water. (TR 5129). Joshua's grandmother stated that he could ask for water when thirsty and for food when hungry. (TR 3918).

Bill Harris, a mental health worker, came in at approximately 7:30. He saw no evidence of a medical emergency. (TR 1120). Harris never expressed any sense of emergency to Stollfuss when he left the detention center to have Mental Health make arrangements for transfer (TR 5132).

At approximately 9:00 a.m., Stollfuss saw Joshua up and on his feet in the soft cell. (TR 5123). Sally Russell, another mental health worker, had been given the responsibility of making arrangements for Joshua's transfer by Bill Harris. She called Dr. Wilder and did not express to him any sense of medical emergency. (TR 949, 962, 1546, 1591). Dr. Wilder issued a routine order to the hospital to admit. (TR 1330).

At 10:50 a.m., Sheriff Rhodes, County Attorney Ted Lympus and Detention Captain Dennis Updegraff looked in on Joshua. No medical emergency was perceived. (TR 5331, 2345, 2400). Lympus thought Joshua was peacefully sleeping. (TR 5325). He stated he could have made arrangements to transport immediately if there was an emergency. (TR 5384-5385). No vomit was seen by Lympus or Rhodes. (TR 2345, 5330).

At approximately 11:55 a.m. or ten minutes before the ambulance arrived, another detention officer, DeeAnn Anderson, looked in on Joshua. He was rocking to try to go to sleep, and there was no vomit on his face. (TR 3616-3617). Anderson saw that Joshua had vomited ten minutes later when the ambulance arrived. (TR 3618).

Terry Eaton, an ambulance attendant, did not perceive any emergency when the ambulance arrived. (TR 1891). Joshua had a good airway with no obstruction (TR 1830) and was breathing fine. (TR 1856). Oxygen was not administered (TR 1861-1862), and there was no gasping for air or air hunger. (TR 1830). Eaton explained that the ambulance did not make an emergency run; if it had been an emergency, he would have run with lights and siren and called city dispatch to trip the traffic lights. (TR 1855, 1858-1859). The run was made down the busy main street of Kalispell with lots of traffic during the noon hour. (TR 1859). It took nine minutes to get to the hospital. (TR 1858-1859).

The three nurses who also saw Joshua at the hospital – Janet Masten, Betty Tillerson, and Sherry Higgins – never perceived any medical emergency until 12:45 p.m. when Joshua had a seizure. (TR 1681 (Tillerson); 4906,

5002, 5011-5012 (Higgins); 1967 (Masten)). Dr. Wilder was not paged "stat." (TR 1681). Dr. Wilder arrived just after Joshua seized, and he felt at that time there was a medical emergency. (TR 1347, 1554, 1561). The hospital's medical expert, Dr. Michael Oreskovich, agreed that Joshua had a seizure similar to a grand mal and that there was no medical emergency prior to 12:45 p.m. (TR 4724, 4728-4729, 4760).

Plaintiffs made much of the fact that Joshua had no medications while detained. His mother did not give his medications to officers on January 17. She stated that the medications made no difference and she did not feel that he suffered any harm or adverse result from not having them. (TR 4371). In addition, Dr. Wilder stated no medication was essential for him while detained. (TR 1501-1502, 1598-1599).

Joshua's hypothalamic dysfunction was a rare condition, not readily appreciated by laypersons and that the person who knew him best was his mother. Graham stated he had not come across it in 12,000 autopsies. (TR 329). Schwartz stated he would not be surprised if there was not another kid like him in Kalispell. (TR 3101). Dr. Thomas Halvorson, a Salt Lake City physician, testified that Joshua's problems would be beyond what an LPN or licensed practical nurse would know or understand. (TR 3998-3999). Dr. Halvorson explained that Joshua's mother, Michelle Lloyd, who was an LPN, would be more knowledgeable than the layperson since she was the one living with him and providing constant care. (TR 3999). Dr. Walker, Joshua's physician in Salt Lake, agreed. (TR 822).

No one other than Plaintiffs' experts, regardless of their level of expertise – detention officers, ambulance attendants, hospital nurses, mental health workers or doctors – stated any emergency existed before 12:45 p.m. These are the facts which the jury accepted and believed and for which substantial evidence exists.

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## APPENDIX B

Leif B. Erickson
District Judge, Department 1
Flathead County Justice Center
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Kalispell, MT 59903-0839
Telephone: (406) 756-5607

**MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

| | |
|---|---|
| **ALLEN BUHR,** Personal Representative of the Estate of Joshua Lloyd, and on behalf of the heirs, **TOM LLOYD** and **MICHELE LLOYD,** | No. DV-89-594(A) |
| Plaintiffs, | |
| vs. | **SPECIAL VERDICT** |
| **FLATHEAD COUNTY,** a political subdivision of the State of Montana; **WALLACE S. WILDER, M.D.; KALISPELL REGIONAL HOSPITAL** and **WESTERN MONTANA REGIONAL MENTAL HEALTH CENTER,** | |
| Defendants. | |

We, the jury, answer the questions submitted to us in this Special Verdict as follows:

QUESTION 1:

A. Do you find that Wallace Wilder, M.D. was negligent in this case?

_ Yes X No

B. Do you find that Western Montana Regional Mental Health Center was negligent in this case?

_ Yes X No

C. Do you find that Flathead County was negligent in this case?

_ Yes X No

D. Do you find that Kalispell Regional Hospital was negligent in this case?

_ Yes X No

If you have answered the above questions "No," you will not answer the remaining questions but will simply sign this Special Verdict and tell the bailiff you have reached your verdict.

If you have answered any of the above questions "Yes," you must answer Question No. 2 but only to those parties for whom you have answered "Yes."

QUESTION 2:

Was the negligence of each of the following parties both a cause-in-fact and a proximate cause of any damage to Plaintiffs?

Wallace Wilder, M.D.: ___Yes ___No

Western Montana Regional Mental Health Center:
___Yes ___No

Flathead County: ___Yes ___No

Kalispell Regional Hospital: ___Yes ___No

If you have answered the above questions "No," you will not answer the remaining questions but will simply sign this special verdict and tell the bailiff you have reached your verdict.

If you have answered any of the above questions "Yes," you must answer Question No. 3.

QUESTION 3:

Do you find that Michele Lloyd was negligent in this case?

___Yes ___No

If you have answered "Yes," go on to Question No. 4. If "No," go on to Question No. 5.

QUESTION 4:

Was the negligence of Michele Lloyd both a cause-in-fact and a proximate cause of any injury or the death of Joshua Lloyd?

___Yes ___No

Go on to Question No. 5.

QUESTION 5:

If you find that any of the following parties were negligent and their negligent conduct was a cause-in-fact and a proximate cause of any injury or the death of Joshua Lloyd, list the percentage of such negligence which caused the pain, suffering or death of Joshua Lloyd:

Wallace Wilder, M.D. ___%

Western Montana Regional Mental Health Ctr ___%

Flathead County ___%

Kalispell Regional Hospital ___%

Michele Lloyd ___%

(must total 100%)

Go on to Question No. 6.

QUESTION 6:

If you find any of the Defendants to be negligent and a cause of Joshua Lloyd's pain, suffering, or death, please answer the following questions:

A. What amount of money do you find will compensate Joshua Lloyd for his medical expenses, funeral expenses, pain, suffering, injuries and death?

$___

B. What amount of money do you find will compensate Tom Lloyd? You should consider his loss of society, care, comfort and companionship and his grief, sorrow and mental anguish.

$___

C. What amount of money do you find will compensate Michele Lloyd? You should consider her loss of society, care, comfort and companionship and her grief, sorrow and mental anguish.

$___

Go on to Question No. 7.

QUESTION 7:

Do you find that Wallace Wilder, M.D. is liable for punitive damages?

_ Yes X No

DATED this 6th day of August, 1991.

/s/ Joan M. Wrench
Foreperson

## APPENDIX C

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Attorney for Plaintiffs Personal
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**MONTANA ELEVENTH JUDICIAL DISTRICT COURT, FLATHEAD COUNTY**

| | |
|---|---|
| **ALLEN BUHR,** Personal Representative of the Estate of Joshua Lloyd, and on behalf of the heirs, **TOM LLOYD, MICHELE LLOYD** and **MARY LLOYD,**<br><br>Plaintiffs,<br><br>vs.<br><br>**FLATHEAD COUNTY,** a political subdivision of the State of Montana; **CHARLES RHODES,** Flathead County Sheriff, in his individual and official capacities; **WALLACE S. WILDER, M.D.; KALISPELL REGIONAL HOSPITAL; WESTERN MONTANA REGIONAL COMMUNITY MENTAL HEALTH CENTER;** and **JOHN DOES I through XV,**<br><br>Defendants. | No. DV-89-594(A)<br><br>**PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS OF DEFENDANTS FLATHEAD COUNTY AND SHERIFF RHODES** |

. . . whether or not they would write a report on the incident. That custom and policy invites the use of excessive force, is contrary to their training and the policies in existence at the time of Joshua's death, but which were not formalized, and is violative of the constitutional requirement against cruel and unusual punishment.

The County, in their brief, ignores these unconstitutional policies because as is provided in *City of Oklahoma v. Tuttle*, 105 Sup. Ct. 24, 27 (1985), a single incident of a constitutional violation which results from an unconstitutional policy or custom is a basis for liability. (See Defendants' own brief on policy violations, dated May 3, 1991, pp. 4-5.)

The County cites a myriad of cases that are simply inapposite to the facts that have been developed in this case.

This is not a procedural due process case which is directed at the absence and inadequacy of hearings. It is only in that context that the U.S. Supreme Court has *considered* the concept of State *negligence* law providing an adequate remedy. Here, we deal with substantive due process and violations of the bill of rights, and the challenge is directed at the *propriety of the conduct itself*, irrespective of a hearing. (See *Civil Rights and Civil Liberties Litigation*, 2d Ed., Sheldon H. Nahmod, pp. 144-151.) We have an obligation to prove deliberate indifference (see Plaintiffs' instructions) in these cases and thus, the negligence concepts of State tort law are inapplicable as a consideration.

Additionally, this is not simply a medical screening case, it is a case where there were unconstitutional policies and customs, where there was a failure of screening, a failure to obtain a medical clearance, a failure to call in a doctor, a failure to allow a mental health professional to go into the cell, a failure to give medication, a failure to call in mental health when Joshua started decompensating, a failure to enter his cell and check on him when he had defecated on the wall and on himself, when he had urinated on himself, when he had removed all of his clothing, when he was hallucinating, seeing things crawling on the floor, seeing knives in the wall, and asking for his mother, for Santa Claus, and if someone would please help him. Clearly, this case involves the above allegations of conduct and not whether Josh received a hearing.

There is no State remedy that addresses the constitutional issues that are set forth in our civil rights claim. Additionally, the facts that have been developed thus far leave too many factual issues for a jury to decide for a Court at this juncture to allow summary judgment. This case is not "clean" as to what policies and procedures were being followed by the detention staff. This is obvious when one . . .

. . .

## APPENDIX D

INSTRUCTION NO. ___

If you find that there was a policy and/or custom of inadequate detention officer supervision and this failure to supervise amounts to deliberate indifference to the rights of the people that the detention officer came into contact, then there is liability on the local government for this failure to supervise.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 52
Authority: *City of Canton, Ohio v. Harris*, 109 Sup. Ct. 1197, 1204 (1989)

INSTRUCTION NO. ___

If you find that there was a policy and/or custom of inadequate medical and mental care at the Flathead County Detention Center, and this inadequate care amounted to a deliberate indifference to the rights of detainees, then the defendants are liable for violation of the Eighth Amendment of the United States Constitution.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 53
Authority: *Estelle v. Gamble*, 429 U.S. 97, 97 Sup. Ct. 285 (1976); *Civil Rights and Civil Liberties Litigation*, 2d Ed., Shelton H. Nahmod, p. 135

INSTRUCTION NO. ___

If you find that there was a policy and/or custom of inadequate medical and mental care at the Flathead County Detention Center, and this inadequate care amounted to a deliberate indifference to the rights of detainees, then Flathead County is liable for violation of the Eighth Amendment of the United States Constitution.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 53(A)

Authority: *Estelle v. Gamble*, 429 U.S. 97, 97 Sup. Ct. 285 (1976); *Civil Rights and Civil Liberties Litigation*, 2d Ed., Shelton H. Nahmod, p. 135

INSTRUCTION NO. ___

If you find that as a result of deliberate indifference to the rights of Joshua Lloyd he was unjustifiably struck, beaten or otherwise inflicted with bodily harm, there has been a violation of the Eighth Amendment.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 54
Authority: *King v. Blankenship*, (4th Cir. 1980); *Civil Rights and Civil Liberties Litigation*, 2d Ed., Shelton H. Nahmod, p. 137

INSTRUCTION NO. ___

If you find that as a result of deliberate indifference to the rights of Joshua Lloyd he was unjustifiably struck, beaten or otherwise inflicted with bodily harm while in the custody of Flathead County, there has been a violation of the Eighth Amendment.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 54(A)

Authority: *King v. Blankenship,* (4th Cir. 1980); *Civil Rights and Civil Liberties Litigation,* 2d Ed., Shelton H. Nahmod, p. 137

INSTRUCTION NO. ___

If you find that an employee of the County or Sheriff used excessive force against Joshua Lloyd and that said conduct was with deliberate indifference to the rights of Joshua Lloyd, then there has been a violation of the Due Process clause of the United States Constitution.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 55
Authority: *Morales v. New York State Dept. of Corrections*, 842 F.2d 27, 30 (2nd Cir. 1988)

INSTRUCTION NO. ___

Under the Plaintiffs' 42 USC § 1983 claim, punitive damages are recoverable against the Sheriff or his employees if you find that their individual conduct demonstrates recklessness or callous indifference to the plaintiffs' Eighth Amendment or Due Process rights.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 57
Authority: *Smith v. Wade*, 461 U.S. 30 (1980)

INSTRUCTION NO. ___

The principles behind the constitutional guarantee against cruel and unusual punishment establish the government's obligation to provide medical care for those whom it is punishing by incarceration. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met . . . and deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," . . . proscribed by the Eighth Amendment.

GIVEN: _____
District Judge

PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 72
Authority: *Estelle v. Gamble*, 429 U.S. 97, 97 Sup. Ct. 285 (1976)